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England and Wales has proved to be a popular jurisdiction in which to bring private antitrust claims. In addition to ‘stand-alone’ and ‘follow-on’ actions (the former requiring the claimant to prove the infringement; the latter relying on an infringement decision of the UK or EU competition regulators), competition law issues are also increasingly being invoked in the context of other commercial disputes.

A number of features of the English legal system are attractive to claimants considering where to issue private antitrust proceedings:

- **Disclosure.** The disclosure rules in English litigation are extensive compared to those of most other EU member states. In High Court proceedings, the parties are required to search for and disclose not only documents on which they themselves rely, but also documents that could harm their case and that could assist the other party’s case. In cartel cases, for example, such disclosure is of particular importance in circumstances where the majority of relevant documentation is likely to be unavailable to all parties to the litigation. While the provisions for disclosure in the Competition Appeal Tribunal (CAT) are more general, typically defendants would similarly need to disclose evidence that is potentially helpful to the claimant.

- **Specialist courts.** The CAT is a specialist competition court which, since the Enterprise Act 2002 (EA02) came into force in June 2003, has had jurisdiction to hear follow-on damages claims. The purpose was to create a specialist forum in which such claims could be brought, with procedural rules more flexible than the Civil Procedure Rules (CPR) applicable in High Court proceedings. That said, follow-on claims (as well as stand-alone actions) can be brought in the High Court. The Competition Law Practice Direction provides for competition litigation in the High Court to be heard in two specific divisions (Chancery and the Commercial Court), with judges in those courts receiving competition law training.

- **Costs.** While the nature of proceedings in England and Wales can make litigating there more expensive than in other jurisdictions, the general rule in High Court proceedings is that the losing party must pay the successful party’s costs. (In the CAT, there is no such general rule and costs awards are made as the Tribunal sees fit.) Fee arrangements involving payment of a percentage of recoveries are not permitted in relation to contentious work, but ‘conditional fee arrangements’ in which lawyers acting for a claimant are paid nothing or very little in the event of an unsuccessful claim but an ‘ uplift’ of up to 100 per cent on their basic fees if they win, have encouraged claimants to issue proceedings here on a relatively low-risk basis in terms of costs.

For these (and numerous other) reasons, claimants have over the years gravitated to England and Wales as a jurisdiction in which to issue proceedings in both stand-alone and follow-on claims. As a consequence, in recent years the law relating to jurisdiction has developed in response to some innovative arguments put forward by claimants keen to issue proceedings here. The two leading cases are *Provimi v Aventis and Cooper Tire v Shell Chemicals*.

In *Provimi*, claimants sought damages from parties to the Vita- mins cartel. In relation to a claim against companies in the Roche group, only the Swiss parent company was an addressee of the Commission’s decision. Nevertheless, the court upheld an argument made by the claimants that an English subsidiary of Roche could be held to have ‘implemented’ the cartel by selling vitamins at the cartel prices, even if it had no knowledge of the cartel itself. This was sufficient to establish the English subsidiary as an ‘anchor defendant’ for jurisdiction, allowing the other entities within the Roche group to be sued in England as co-defendants to the same claim.

The *Cooper Tire* case related to a follow-on action from the Commission’s cartel decision in *Synthetic Rubber*. None of the addresseees of the Commission’s decision were English. However, a number of tyre manufacturers who had bought and used synthetic rubber brought an action for damages in the High Court relating to their purchases across Europe, on the basis that English subsidiaries of some (but not all) of the cartelists had implemented the cartel in the UK by selling products at cartel prices. These English subsidiaries would, like in *Provimi*, be able to serve as the ‘anchor defendants’. The Court of Appeal refused to grant a strike-out application lodged by some of the defendants, holding that the claim could be brought in England. In the court’s view, although the anchor defendants were not addresseees of the Commission’s decision, the pleadings were sufficiently broadly drafted to encompass the possibility that they had knowledge of, or were party to, the cartel. The court considered that, since cartel agreements tend to be secret by their very nature, the strength or otherwise of the claimant’s argument as to the knowledge possessed by the English subsidiaries could not be assessed until after disclosure.

Having established jurisdiction, another element to bringing a claim in England and Wales is consideration of whether it should be brought in the High Court or the CAT. As noted above, the CAT was established as a specialist competition court. However, the CAT’s popularity has not been what one might have expected, and claimants have tended to favour the High Court as the forum in which to issue proceedings. This has been in no small part due to the limitations inherent in the CAT’s jurisdiction, and to some recent judgments, which combine to militate in favour of the High Court.

In particular, the CAT is only competent to hear follow-on damages claims, which inherently limits the scope of private antitrust litigation that can be brought before it. This limit to the CAT’s competence has been strictly enforced in *English Welsh and Scottish Railways v Enron Coal Services*, EWS succeeded in having part of a claim against it struck out on the basis that part of the claim did not stem from the regulator’s underlying infringement decision.
Moreover, as a general rule, where an infringement decision is under appeal a follow-on action can only be brought in the CAT with the Tribunal’s permission. This is in contrast to the position in the High Court, where claims can be issued even when an appeal is pending. The recent National Grid and Emerald Supplies cases demonstrate this, National Grid v ABB and others involved proceedings against members of the Gas-Insulated Switchgear cartel. Even though the Commission’s decision was being appealed by some (but not all) of the defendants, the claimants commenced proceedings in the High Court. An application by the defendants for the action to be stayed pending the outcome of the European court appeals was successful, but the court permitted further pretrial steps (including some limited disclosure) to be taken in the interim. In Emerald Supplies Limited v British Airways plc, the claimants issued proceedings against BA in relation to the Commission’s Airfreight cartel investigation, even before the Commission’s decision was issued. Contrast this with the more restrictive approach of the CAT in Emerson and others v Morgan Crucible and others. The claimants were refused permission to bring proceedings against parties to the Electrical and Mechanical Carbon and Graphite Products cartel who were appealing the Commission’s decision to the European courts. Even in relation to proceedings against Morgan Crucible, in which the immunity applicant did not appeal the decision, the CAT considered that the claimants needed permission before they could bring a claim. (Permission was granted, although the parties subsequently agreed to a stay pending the outcome of the European court appeals.)

These issues have made it somewhat more difficult than perhaps initially anticipated for claims to be brought in the CAT. With the High Court increasingly developing expertise in the field of competition law, it remains to be seen whether the tide will turn in favour of the CAT or whether the High Court will remain the forum of choice for claimants bringing competition law claims.

The UK government has recently issued a consultation in relation to private actions in competition law (Department for Business Innovation and Skills ‘Private Actions in Competition Law: A Consultation on Options for Reform’ (April 2012)), which may encourage claims to be brought in the CAT. The proposals that are under consultation are far reaching and could potentially lead to significant changes to private antitrust litigation in the UK. The proposals include:

- in relation to the role of the CAT: introducing regulations to enable the High Court to transfer cases to the CAT; amending the Competition Act 1998 (CA98) to allow the CAT to hear stand-alone damages claims as well as follow-on damages claims; empowering the CAT to grant injunctions; and introducing a ‘fast-track’ route in the CAT for SMEs (including allowing the granting of interim injunctions, waiving or limiting cross-under takings for damages, having no or limited court fees, a cap on costs awarded up to a maximum of £25,000 and having the aim of hearing a case within six months of it being brought);
- introducing a rebuttable presumption of loss in cartel cases, the current suggestion being that there would be a presumption that a cartel had affected prices by 20 per cent;
- introducing the ability to bring opt-out collective actions in stand-alone and follow-on damages actions in the CAT;
- encouraging alternative dispute resolution (ADR);
- protecting certain documents submitted as part of the leniency process from disclosure, in particular documents which would not have been created if a company had not been seeking leniency; and
- limiting a whistle-blower’s liability in damages actions to the damage that they directly caused, rather than holding them jointly and severally liable with other cartel participants for the damage caused by the cartel.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions arising out of an infringement of competition law may be brought in the High Court based on the tort of breach of statutory duty (Garden Cottage Foods Limited v Milk Marketing Board [1984] AC 130 at 141; Creban v Inntrepreneur Pub Company [2004] EWCA Civ 637 para 156). The breach is of section 2(1) of the European Communities Act 1972, which imports the provisions of the Treaty (in the competition law context, articles 101 and 102 TFEU) into English law; or of the provisions of chapters I or II of the CA98. Claims brought in the High Court may also be based on the torts of unlawful interference with trade, conspiracy to defraud or misrepresentation. For example, in Norris v Government of the United States of America [2008] UKHL 16, the House of Lords considered that agreements in restraint of trade might be actionable at common law if there are aggravating features present such as fraud or misrepresentation.

Follow-on damages claims brought in the CAT are based on sections 47A and 47B of the CA98 as amended by the EA02. Section 47A provides for private actions for compensation to be brought in the CAT only in circumstances where an infringement decision has already been reached by either the UK or EU competition authorities (ie, follow-on claims). Section 47B provides the basis for representative actions.

Provided jurisdiction is established, any natural or legal person who has suffered loss or damage as a result of an infringement of articles 101 or 102 TFEU or chapters I or II of the CA98 has standing to bring a claim in the High Court or alternatively the CAT (section 47A CA98) subject to the limitations of bringing a claim in the CAT described further in question 3.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

The CAT has jurisdiction to deal with follow-on damages actions as provided for in sections 47A and 47B of the CA98. In addition to the CAT, claimants can bring an action in the High Court, usually for breach of statutory duty arising out of a breach of articles 101 or 102 TFEU or chapters I or II of the CA98.

High Court

Both follow-on and stand-alone claims can be brought in the High Court. All claims, whether arising in relation to an infringement of articles 101 or 102 TFEU or of chapters I or II of the CA98, should be brought in the Chancery Division or Commercial Court (see the Competition Practice Direction and CPR Rule 58.1(2)). Under CPR Rule 30.8 and the Competition Law Practice Direction, any competition law claim commenced in the Queen’s Bench Division or County Court should be transferred to either the Chancery Division or, where appropriate, the Commercial Court.

Both follow-on and stand-alone claims that relate to infringements of articles 101 and 102 TFEU are based on breach of statutory duty as noted above. In relation to follow-on damages actions, section 58 of the CA98 states that the court must accept the decision of the regulator (the OFT or sectoral regulators in the UK and the European Commission within the EU) as evidence of the infringement of articles 101 and 102 TFEU or of chapters I or II of the CA98. Claims brought in the High Court may also be brought in the CAT or whether the High Court will remain the forum of choice for claimants bringing competition law claims.

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CAT

Stand-alone claims cannot be brought in the CAT; only follow-on actions for monetary compensation can be brought. These are brought under sections 47A and 47B of the CA98 as inserted by the EA02. In addition, the Court of Appeal has held, in Enron Coal Services v English Welsh and Scottish Railways [2011] EWCA Civ 2, that section 58 of the CA98 also applies to proceedings brought in the CAT, unless the Tribunal directs otherwise.

Section 47A applies to persons who have suffered loss or damage as a result of an infringement of UK or EU competition law (chapters I or II of the CA98 or articles 101 or 102 of the TFEU). The limited nature of the CAT’s jurisdiction was emphasised in English Welsh and Scottish Railways v Enron Coal Services [2009] EWCA Civ. 647. In that case, the claimant sought (among other things) damages in respect of an alleged overcharge it claimed to have paid, although the underlying infringement decision that was the basis of the claim related only to discriminatory pricing which had potentially put the claimant at a disadvantage when tendering for a contract. The part of the claim relating to the overcharge was struck out by the Court of Appeal, on the basis that it did not form part of the regulator’s infringement finding. In Emerson Electric Co and Others v Morgan Crucible Company Ple and Others [2011] CAT 4, the CAT also struck out proceedings brought against the UK subsidiary of one of the addressees of the Commission’s Electrical and Mechanical Carbon and Graphite Products cartel decision, on the basis that there was no decision finding an infringement by the UK subsidiary. The action was not a follow-on claim and the CAT did not have jurisdiction to hear it. The CAT’s judgment is on appeal to the Court of Appeal. In 2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited [2012] CAT 19, a follow-on damages claim in which the claimant sought damages in relation to the defendant’s abuse of its dominant position whereby it had launched a competing bus service with exclusionary and predatory intent (the OFT’s Cardiff Bus decision), the CAT rejected a strike-out application by the defendant based on the claimant’s reliance on certain facts including (among other things) intimidation tactics used by the competing services in relation to which the OFT had not made findings of fact. In so doing, the CAT held that the OFT’s infringement decision related to (among other things) the operation of the competing bus service itself and that consequently in order to assess damages flowing from the infringement, the relevant counter-factual scenario was one where the competing service did not operate at all. As a result, if the intimidation claims in relation to the competing service were substantiated, the claimant was entitled to rely upon them in support of its damages claim.

Under section 47B, a representative action can be brought by specified bodies on behalf of a number of consumers. The only ‘specified body’ for section 47B purposes to date is the Consumers’ Association, known as Which?.

Transfer between the High Court and the CAT

Section 16 of the EA02 provides for the transfer of damages claims between the High Court and the CAT and vice versa. Specifically, it provides that regulations can be made in order to allow the High Court to transfer cases to the CAT. No such regulations have yet been passed although the Department for Business Innovation and Skills consultation document ‘Private Actions in Competition Law: A Consultation on Options for Reform’ (April 2012) contains proposals to make such regulations.

Private actions can be brought in respect of any breach of UK or European competition law (chapters I or II of the CA98 and articles 101 or 102 TFEU respectively). Private actions in the High Court can either be brought as a stand-alone claim (ie, one in which the claimant must show the infringement as well as loss and causation) or as a follow-on action (in which an infringement finding has already been made by the competition regulator at UK or EU level and in respect of which the claimant need only show loss and causation). Only follow-on actions can be brought in the CAT.

Where the defendant is domiciled in a member state (other than Denmark), jurisdiction will be governed by Council Regulation 44/2001 (the Brussels Regulation). (Defendants domiciled in Denmark are subject to the jurisdiction provisions set out in an agreement with the EU (2005); and defendants domiciled in Norway, Switzerland and Iceland are subject to the provisions of the Lugano Conventions.)

The main provisions of the Brussels Regulation in the context of where competition damages claims can be brought are article 2(1) (the place where the defendant is domiciled); article 5(1) (in contract claims, the place of performance of the obligation under the contract); article 5(3) (in tort claims, the place where the harmful event occurred); article 6(1) (a defendant joining co-defendants to an existing action); article 23 (jurisdiction agreements); article 24 (submission to the jurisdiction); and article 28 (related actions).

According to the Brussels Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state. Under article 60 of the Regulation, a corporation is ‘domiciled’ in the UK if it is incorporated or has its registered office in the UK, or its central administration is controlled or exercised in the UK. This is subject to the limited exceptions of articles 22 to 24 (exclusive jurisdiction in certain limited areas, jurisdiction agreements and submission to the jurisdiction respectively) and article 27 (lis pendens), but also to provisions in articles 5(1), 5(3) and 6.

Article 5(1) relates to contract claims and states that, in matters relating to a contract, a person domiciled in a member state may, in another member state, be sued in the courts for the place of performance of the obligation in question. Unless otherwise agreed, this is the place where the goods were or should have been delivered or, in relation to a contract for services, where the services were or should have been provided. If the obligation being sued for is non-payment, it will be the member state in which payment was due to be made.

Article 5(3) provides that ‘a person domiciled in a member state may, in another member state, be sued in matters relating to tort, delict, or quasi-delict in the courts of the place where the harmful event occurred or may occur’. Long-standing EU case law interprets this to give the claimant a choice between the place where the damage was sustained and the place where the event giving rise to it took
place. This provision is more relevant to private antitrust litigation than is article 5(1), given that infringements of competition law are treated as torts of breach of statutory duty. In SanDisk Corporation v Philips Electronics & Ors [2007] EWHC 332, which related to an article 102 TFEU case, the court held that if the event setting the tort in motion took place in England or Wales, the English courts could have jurisdiction under this provision. In that case, however, the link to the UK was tenuous and the court concluded that jurisdiction could not be established on the facts. In Cooper Tire & Rubber Company v Shell Chemicals UK Ltd [2009] EWHC 2609 (upheld on other grounds on appeal in Cooper Tire & Rubber Company Europe Ltd & Ors v Dore Deutschland Inc & Ors [2010] EWCA Civ 864), which related to an article 101 TFEU case, the court considered that the mere fact of the first meeting taking place in England and Wales would be insufficient to establish that the ‘wrongful act’ took place there.

Article 6(1) of the Brussels Regulation provides (in relation to claims against a number of defendants) that claimants can bring a claim in the courts for the place where any one of the defendants is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. This enables a number of defendants from different member states to be sued in one action in England provided one of them (the ‘anchor defendant’) is domiciled there. It can also be relied on to sue a number of different companies within the same group in England. In reality, the majority of claims involve those brought by companies claiming to have been the victims of a cartel (typically, direct or indirect purchasers claiming they were overcharged by the cartel) and therefore tend to be brought as follow-on damages actions following an OFT or Commission decision finding a breach of chapter I / article 101 TFEU. In such cases, the claimant may want to bring an action against all or some of the addressees of the OFT/Commission decision, so would seek to find an anchor defendant domiciled in England, bring the claim on the basis of article 2(1), and then bring in the remaining defendants on the basis of article 6(1).

The leading case on jurisdiction in this context is Provmi v Aventis [2003] EWHC 961. The case arose out of the Commission’s 2001 decision in the Vitamins cartel. A claim was brought in England by a German claimant (Trouw) against four companies in the Roche group, including the Swiss parent company F Hoffman La Roche AG and three subsidiaries which were English, Swiss and German. Of these, only F Hoffman La Roche was an addressee of the Commission’s infringement decision. Jurisdiction was argued as a preliminary issue. The court held that Trouw had an arguable claim that the English subsidiary (Roche Products Limited) had ‘implemented’ the cartel by selling vitamins at the cartel prices, even if it had no knowledge of the cartel itself. This decision enables proceedings to be brought in England against a number of defendants on the basis of an English anchor defendant which is merely a subsidiary of one of the addressees of a Commission decision, in circumstances where the subsidiary neither played a direct role in the cartel nor had knowledge of it.

The effect of the judgment in Provmi was unsuccessfully challenged in the case of Cooper Tire & Rubber Company v Shell Chemicals UK Limited [2009] EWHC 2609. The Cooper Tire case related to a follow-on action from the Commission’s cartel decision in Synthetic Rubber. None of the addressees of the Commission’s decision were English. However, a number of tyre manufacturers who had bought and used synthetic rubber brought an action for damages in the High Court relating to their purchases across Europe, on the basis that English subsidiaries of some (but not all) of the cartelists had implemented the cartel in the UK by selling products at cartel prices. These English subsidiaries would, like in Provmi, be able to serve as the ‘anchor defendants’ and a basis on which the other parties to the cartel (with no English subsidiaries) could be brought into the proceedings under article 6(1) of the Brussels Regulation. The Court of Appeal refused to grant a strike-out application lodged by some of the defendants, holding that the claim could be brought in England. In the court’s view, although the anchor defendants were not addressees of the Commission’s decision, the pleadings were sufficiently broadly drafted to encompass the possibility that they had knowledge of, or were party to, the cartel. The court considered that, since cartel agreements tend to be secret by their very nature, the strength or otherwise of the claimant’s argument as to the knowledge possessed by the English subsidiaries could not be assessed until after disclosure. The result is that the English courts will have jurisdiction to hear Europe-wide cartel damages claims where the pleadings allege that an English-domiciled subsidiary of a cartelist implemented the cartel and either had knowledge of, or was party to, anti-competitive conduct. The Court of Appeal in Cooper Tire considered the pleadings to be sufficiently widely drafted to encompass the possibility that the English-domiciled subsidiary implemented or had knowledge of the cartel.

While Cooper Tire did not test the application of the Provmi judgment, it did confirm the attractiveness of the UK as a jurisdiction in which to bring Europe-wide cartel claims. It appears that, according to the Court of Appeal judgment, provided claimants draft their pleadings to allege knowledge by an English subsidiary of the cartel arrangements (or at least to allow for the possibility), this may be enough to constitute the jurisdictional hook required to bring the claim in the English court. The effect of Provmi and Cooper Tire is that a claimant seeking damages for loss suffered as a result of a breach of European competition law can sue for its entire loss in the English courts irrespective of where the loss was suffered provided it can identify an English subsidiary of one of the addressees of the decision (which will be assumed to have implemented the anti-competitive conduct), or if its pleadings are sufficiently widely drafted as to allege or allow for the possibility that the English subsidiary had knowledge of or was party to the cartel. This is regardless of whether the claimant had any dealings with the English subsidiary. The English subsidiary does not have to be an addressee of the Commission’s decision itself.

The Court of Appeal may have the opportunity to reconsider this case law in Toshiba Carrier UK & Ors v KME Yorkshire Limited & Ors. Following unsuccessful strike out and summary judgment applications by the UK anchor defendants on the basis that they were not addressees of the Commission decision ([2011] EWHC 2663), they were granted permission to appeal to the Court of Appeal ([2012] EWCA Civ 169) on the basis that (among other things) there was ‘some force’ to the argument that mere implementation of a cartel arrangement with knowledge that other legal entities within the undertaking have engaged in an unlawful activity is not of itself good enough to amount to an infringement of article 101 TFEU. According to the judges in the permission hearing this consequently meant that it may not be enough simply to plead that the UK defendants were aware of anti-competitive arrangements and that any allegation of knowledge must therefore be pleaded with precision.

England is an attractive jurisdiction for many claimants, and defendants are wise to the liberal scope of jurisdiction under the Brussels Regulation following Provmi that will allow claims to be brought here. As a result, defendants are seeking other ways in which the jurisdiction of the English courts might be limited. In this regard, the ‘Italian torpedo’, typically used in intellectual property cases, has been deployed in competition cases where a defendant seeks to preempt a claimant’s choice of jurisdiction by commencing proceedings seeking a negative declaration as to liability in another European jurisdiction. Articles 27 and 28 of the Brussels Regulation provide for courts to dismiss or stay proceedings where the same cause of action is brought here. As a result, defendants are seeking other ways in which claims to be brought in Europe-wide cartel claims. It appears that, according to the Court of Appeal judgment, provided claimants draft their pleadings to allege knowledge by an English subsidiary of the cartel arrangements (or at least to allow for the possibility), this may be enough to constitute the jurisdictional hook required to bring the claim in the English court. The effect of Provmi and Cooper Tire is that a claimant seeking damages for loss suffered as a result of a breach of European competition law can sue for its entire loss in the English courts irrespective of where the loss was suffered provided it can identify an English subsidiary of one of the addressees of the decision (which will be assumed to have implemented the anti-competitive conduct), or if its pleadings are sufficiently widely drafted as to allege or allow for the possibility that the English subsidiary had knowledge of or was party to the cartel. This is regardless of whether the claimant had any dealings with the English subsidiary. The English subsidiary does not have to be an addressee of the Commission’s decision itself.

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anti-competitive behaviour in relation to the activities covered by the Commission’s decision and that the alleged cartel had had no effect on prices, and that the defendants could not complain that they had suffered damage as a result of the cartel. When subsequently sued in England, the defendants sought to rely on articles 27 and 28 of the Brussels Regulation to dismiss or stay the English proceedings, on the basis that the Italian courts were the courts first seised. The Italian court issued a preliminary ruling on the negative declaration in 2009 stating that it considered the use of the Italian torpedo to be ‘unconstitutional’. That ruling has been appealed. In the meantime, in proceedings before the English High Court, the court determined that it did have jurisdiction to hear the claim (brought by the defendant to the Italian proceedings), that the court was not required to grant a stay under article 27 of the Brussels Regulation, and that the court should not exercise its discretion to grant a stay under article 28 of that Regulation (see Cooper Tire & Rubber Company v Shell Chemicals UK Limited [2009] EWHC 2609, upheld on appeal in Cooper Tire & Rubber Company Europe Ltd & Ors v Dow Deutschland Inc & Ors [2010] EWCA Civ 864).

Article 23 of the Brussels Regulation provides that if parties, one or more of which is domiciled in a member state, have agreed that a court of a member state is to have jurisdiction to settle legal disputes between them, then those courts will have jurisdiction. The Brussels Regulation assumes that, unless the parties have agreed otherwise, that jurisdiction will be exclusive. There are a number of formal requirements for article 23 to apply (eg, the jurisdiction agreement needing to be evidenced in writing or by prior course of dealing, etc). As a number of private antitrust litigation claims in England are brought by direct or indirect customers of parties to a cartel, there may in such cases be contracts in place between the parties (eg, relating to their supply contracts) that specify a jurisdiction clause. Whether the clause is drafted widely enough to fall within the scope of article 23 will be a matter of interpretation. In Prouymi such a clause which stated that ‘any controversies’ that could not be settled would be brought before the courts in Switzerland was held not to include disputes over an overcharge on cartel products and therefore did not constitute a jurisdiction clause under article 23. This is a relatively narrow interpretation of article 23 and may limit a claimant’s ability to rely on this jurisdiction gateway going forward. Note, however, that the decision was reached on a preliminary issue and leave to appeal was granted although the case settled before the appeal was heard – a higher court may therefore determine the issue differently.

Under article 24 of the Brussels Regulation, any defendant (not only one domiciled in a member state) entering an appearance in the courts of the member state is deemed to submit to that member state’s jurisdiction. The exception is where the defendant is appearing to contest the court’s jurisdiction, provided it raises the jurisdictional challenge at the first available procedural opportunity under relevant national law. Anything going beyond a challenge to jurisdiction will be considered to be ‘entering an appearance’ and will therefore be taken as submission under article 24.

The jurisdiction rules of the Brussels Regulation (and Lugano Conventions) only apply to defendants domiciled in a member state or Norway, Switzerland and Iceland (as above). For defendants domiciled in a non-member state, the residual common-law jurisdiction regime will apply. In such cases, jurisdiction depends on whether the defendant is located within England and Wales. If so, the English courts have jurisdiction, although they can stay proceedings on application if it is shown to them that another court that also has jurisdiction is a more appropriate forum. If the defendant is not within England and Wales, the claimant can apply for permission to serve outside the jurisdiction if it can show that the claim has a reasonable prospect of success; that there is a basis for jurisdiction set out in the CPR (including that damage was sustained in the jurisdiction or as a result of an act committed within the jurisdiction or that the defendant is a necessary and proper party to a claim against another defendant); and that England and Wales is the proper place to bring the claim. In practice, the majority of private antitrust litigation in England and Wales is likely to be brought following on from cartel decisions of the UK or EU competition regulators whose decisions are usually addressed to at least one undertaking within the EU, and therefore with at least one subsidiary domiciled in a member state. Recourse to the common-law jurisdiction regime is therefore likely to be necessary in a minority of cases.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Damages actions can be brought against any entity that infringes the competition rules. Actions can therefore be brought against legal entities and against individuals to the extent they are an undertaking and therefore capable of breaching articles 101 and 102 TFEU and chapters I and II of the CA98. As regards defendants from other jurisdictions, as noted above, the Brussels Regulation allows for defendants not domiciled in England and Wales to be sued in the English courts under relevant provisions of that regulation. The Prouymi and Cooper Tire judgments have also been helpful to claimants seeking to bring actions against undertakings domiciled in other jurisdictions (see question 5).

In Safeway Stores Ltd and others v Twigger and others [2010] EWCA 1472, Safeway brought an action against its former directors and employees to seek to recoup the amount of an agreed fine that would be paid following settlement in the OFT’s Dairy investigation. The investigation alleged breaches of chapter I of the CA98 against a number of dairy companies and supermarkets in the UK. The OFT’s case was settled in respect of Safeway’s liability (which had been the subject of a takeover by Morrisons). It was agreed that Safeway would pay a fine that would be subject to a reduction if it continued to cooperate with the OFT’s investigation until the issuance of a decision. Following receipt of the statement of objections but prior to the decision, Safeway issued proceedings against its former directors and employees alleging breach of contract and negligence, and seeking to recover the full amount of the fine from them. The Court of Appeal unanimously held (reversing the decision of Flaux J at first instance) that Safeway’s claim should be struck out, holding that the ex turpi causa maxim applied to preclude Safeway from seeking to recover from the defendants either the amount of the penalty imposed by the OFT or the costs incurred as a result of the OFT’s investigation. An undertaking that infringes provisions of the Competition Act 1998 relating to anti-competitive activity and is duly penalised by the OFT therefore cannot recover the amount of such penalties from its directors or employees whose actions allegedly caused the infringement. This was a novel use of private antitrust litigation to recoup the amount of a fine levied on an infringing undertaking, and the Court of Appeal’s judgment was unequivocal in rejecting such an approach.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

Costs can be significant in the context of litigation in the English courts (see further question 32 below), in particular given that the unsuccessful party will, as a general rule, be required to pay the winning side’s costs. It is therefore important for claimants to ensure they have considered the risk of an adverse costs order, and how they will pay for it, before commencing litigation. While fee arrangements involving payment of a percentage of recoveries are not permitted in relation to contentious work, various alternative funding solutions are available.

Conditional fee arrangements (CFAs) may be entered into in the context of English litigation. CFAs usually involve the lawyers acting on a ‘no win, no fee’ basis, but with provision for a ‘success fee’ (ie, their basic fee, plus an uplift) to be paid to them in the event of
a successful outcome. To be enforceable, a CFA must comply with section 58 of the Courts and Legal Services Act 1990. In particular, CFAs must be in writing and the percentage uplift cannot be more than 100 per cent.

Third-party funding by a professional funder is also an option. Applications for pre-action disclosure that are overly broad will be refused, so potential claimants should consider carefully the scope of any requests they make. In 

<table>
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<th>Are jury trials available?</th>
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<td>Jury trials are not available either in the High Court or in the CAT in relation to competition proceedings.</td>
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<th>What pretrial discovery procedures are available?</th>
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<td>In the context of competition litigation there may be an asymmetry between the claimants and defendants in terms of the documentary evidence they hold that is relevant to bringing a claim: claimants are likely to have significantly fewer relevant documents than defendants who were parties to a cartel. The broad disclosure obligations incumbent on parties to English litigation is one of the reasons why England and Wales as a jurisdiction is increasingly favoured by claimants bringing private antitrust actions. Different procedures are, in theory, applicable in the High Court and the CAT.</td>
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**High Court**

Disclosure in the High Court is governed by CPR part 31, which provides for three broad categories of disclosure: ‘standard’ disclosure, ‘specific’ disclosure, and ‘pre-action’ disclosure.

‘Standard’ disclosure generally takes place after pleadings have closed, i.e., after the claim form, defence and any replies have been served. It requires the parties to the litigation to search for and disclose all documents in their control on which they rely, and documents which adversely affect their own case, adversely affect another party’s case, or support another party’s case. Privileged documents (see question 11) need to be listed in the disclosure statement but are not disclosed. However, the fact that documents are confidential is not normally a bar to disclosure: concerns of commercial sensitivity are typically dealt with by way of a ‘confidentiality ring’, whereby only specified persons (eg, external experts, legal advisers, in-house lawyers) will be permitted access to the documents. One recent example of the use of a confidentiality ring is Nokia Corporation v AU Optronics Corporations & Ors [2012] EWHC 731 a damages claim brought by Nokia against certain companies involved in the manufacture or supply of liquid crystal displays. During the course of the English litigation, Nokia’s English legal team obtained material disclosed in US proceedings pursuant to a confidentiality ring. Nokia

obtained an order in the English litigation for use of the US disclosure material in a manner reflecting the US confidentiality arrangements. This led to certain parts of Nokia’s particulars of claim (which had been amended in light of the material disclosed in the US proceedings) not being able to be shared with the in-house counsel of some of the defendants. The Court held that Nokia bore the burden of seeking to adjust the earlier order to allow the in-house counsel of those defendants to view the material.

‘Specific’ disclosure can be sought in relation to documents that have not been disclosed as part of standard disclosure (CPR 31.12). This means that a party is required to disclose specific documents or categories of documents. Disclosure can also be sought from non-parties under CPR 31.17 if a document or class of documents is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary to dispose of the claim fairly or to save costs.

In addition to disclosure in the course of litigation, claimants or potential claimants can ask for ‘pre-action’ disclosure under CPR 31.16 from someone who is likely to be a party to litigation. CPR 31.16(3) states that pre-action disclosure can only be ordered where the respondent is likely to be a party to subsequent proceedings; the applicant is also likely to be a party to those proceedings; if proceedings had started, the documents or classes of documents of which disclosure is sought would fall within standard disclosure; and disclosure before proceedings have started is desirable either to dispose fairly of anticipated proceedings, to assist the dispute to be resolved without proceedings, or to save costs. Note that even in the case of successful applications for pre-action disclosure, it is normally the applicant who is required to pay the costs of the respondent.

Applications for pre-action disclosure that are overly broad will be refused, so potential claimants should consider carefully the scope of any requests they make. In 

The status of leniency agreements and settlement agreements with the Commission or OFT has also been the subject of dispute in the context of High Court proceedings in recent years. In relation to leniency applications, a distinction should be drawn between the application itself, and the documentation submitted in support (which will usually be contemporaneous documents, for example, minutes of cartel meetings, evidence of contacts between competitors, etc).

The recent ECJ case C-360/09 Pfeiderer v Bundeskartellamt and the judgment of the High Court in National Grid Electricity Transmission PLC v ABB Ltd and Others [2012] EWHC 869 have gone some way to clarifying the position in relation to the disclosure of documents submitted to national competition authorities and the European Commission under their respective leniency regimes.

The Pfeiderer judgment arose out of a decision of the German national competition authority (the Bundeskartellamt) which found an infringement of article 101 TFEU by a cartel of European manufacturers of decor paper. Following the decision, Pfeiderer, a purchaser of decor paper, applied to the Bundeskartellamt seeking access to the material on its file on the cartel, including documents relating to leniency applications, with a view to bringing follow-on damages actions. The Bundeskartellamt rejected Pfeiderer’s request in part
and Pfleiderer then brought an action before the Amtsgericht Bonn
challenging the Bundeskartellamt’s decision, seeking access to the
complete file. The Amtsgericht made a reference to the ECJ.

In its judgment, the ECJ stated that in considering an application
for access to documents relating to a leniency programme submit-
ted by a person who is seeking to obtain damages from another
person who has taken advantage of such a leniency programme, it is
necessary to weigh the respective interests in favour of disclosure of
the information and in favour of the protection of that information
provided voluntarily by the applicant for leniency. That weighing
evidence can be conducted by the national courts and tribunals only
on a case-by-case basis, according to national law, and taking into
account all the relevant factors in the case. As such, the ECJ held that
EU law does not preclude a damages claimant from being granted
access to documents relating to a leniency procedure but that it is for
the courts and tribunals of the member states, on the basis of their
national law, to determine the conditions under which such access
must be permitted or refused by weighing the interests protected by
European Union law.

The Pfleiderer judgment has recently been considered in ongo-
ing litigation in the English High Court in National Grid Electricity
Transmission PLC v ABB Ltd and Others [2012] EWHC 869. In the
course of the litigation, National Grid applied for disclosure of
certain documents which may have contained information supplied
in the context of leniency applications. These documents broadly
fell within three categories: (i) the confidential version of the Com-
mmission’s decision; (ii) ABB’s (the immunity applicant) reply to the
Commission’s statement of objections; and (iii) replies to requests for
information made by the Commission. National Grid did not apply
for disclosure of the corporate statements themselves.

The judge (Roth J) invited, and received, an amicus curiae obser-
vation from the Commission in relation to disclosure of certain leni-
cy documents submitted to it as part of its leniency regime. The observations stated, among other things, that ‘the Commission’s
long-established practice is that the corporate statements specifically
prepared for submission under the leniency programme are given
protection both during and after its investigation.’ Having considered
these observations, Roth J held that Pfleiderer, which was a decision
in relation to the leniency programme of the national competition
authority in Germany, equally applied to the Commission’s leniency
programme and, as such, to the disclosure application in issue. He
also held that it was not exclusively the Commission’s jurisdiction
to determine the disclosure of leniency materials submitted to it and
that a national court could conduct the Pfleiderer balancing exercise,
weighing the interest in disclosure as against the need to protect an
effective leniency programme.

Roth J held that a number of factors were relevant in the balanc-
ing exercise. The first of these was whether such disclosure would
increase the leniency applicants’ exposure to liability or would put
these parties at a relative disadvantage as against the parties that did
not cooperate. Roth J stated that he did not think this was a realistic
prospect in the circumstances of the case. Second, he considered
relevant the potential effect of a disclosure order in this case in deter-
rining potential leniency applicants as regards other cartels that are yet
to be uncovered. Third, Roth J considered whether the disclosure
sought was proportionate, an argument which he considered in light
of whether the information was available from other sources and the
relevance of the leniency materials being sought. As regards the first
of these, Roth J held in the circumstances of the case, there were no
other means available (at least not without excessive difficulty) for
National Grid to derive the information. The question of relevance
needed to be determined on a document by document basis, an exer-
cise which Roth J subsequently undertook.

Ultimately, Roth J ordered only very limited disclosure of the
documents requested.

The Commission is planning to adopt a directive in relation to
antitrust damages actions. The directive is aimed at, among other
things, implementing common rules as regards access to evidence
and protection of leniency programmes in the context of antitrust
damages actions brought before national courts.

In addition, the Department for Business Innovation and Skills
consultation document ‘Private Actions in Competition Law: A Con-
sultation on Options for Reform’ (April 2012) contains proposals to
limit a whistle-blower’s liability in damages actions to the damage
that they directly caused.

CAT

Follow-on damages claims brought in the CAT require claimants to
annex to the claim form ‘as far as practicable a copy of all essential
documents on which the claimant relies’ (CAT Rule 32(4)(b)). In
practice, as noted above, claimants in follow-on damages actions
are likely to rely to a large extent on documents in the hands of the
defendant, and on the CAT to order disclosure of them.

In contrast to the specific provisions in the CPR relating to dis-
closure, however, the CAT Rules are more general. They provide sim-
ply that the CAT ‘may give directions [... ] for the disclosure between,
or the production by, the parties of documents or classes of docu-
ments’ (CAT Rule 19(2)(k)). The CAT therefore has full discretion
on the issue of what should be disclosed, by whom, and when. In
practice, as with High Court proceedings, it orders disclosure after
close of pleadings. As is the case in High Court litigation, privileged
documents are protected from disclosure; and confidentiality rings
are also used to ensure commercially sensitive information is ring-
fenced as appropriate.

In addition to this ‘standard disclosure’ in the CAT, it is also pos-
sible for parties to request specific disclosure, in particular because
the requirement to disclose documents with pleadings only applies to
documents supporting the case. In this respect, the CAT has adopted
the general rules of disclosure set out in the CPR (see Aqua Vitae
(UK) Limited v DGWS [2003] CAT 4). In order to obtain specific
disclosure, the applicant must specifically identify the documents
sought. The application will be rejected if the documents are not rel-
vant and necessary for the fair and just disposal of the proceedings,
although the Tribunal will look at the case as a whole (Albion Water

10 What evidence is admissible?

High Court

Factual evidence given in the High Court may stem from documents
or witnesses.

In relation to documents, contemporaneous documents can be
particularly valuable in relation to allegations of collusive or car-
et activity where evidence is sparse. For example, in Bookmakers
Afternoon Greyhound Services Limited & Others v Amalgamated
Racing Limited & Others (2008) EWHC 2688) the court accepted that
‘documents which pointed, even obliquely, to the existence of an
agreement or concerted practice had particular weight’ (paragraph
18). It is generally understood that contemporaneous documents can
be relied upon as evidence of the truth of their contents (PD 32 para-
graph 27.2; in relation to the Commercial Court, appendix 10 of the
Commercial Court Guide). Under CPR 32.19 a party is deemed to
admit the authenticity of any document disclosed to him or her under
CPR 31 unless notice is served requiring the other party to prove the
document at trial.

In relation to witness evidence, this is provided in witness state-
ments and oral evidence at trial. Witness statements stand as the
witness’s evidence in chief (CPR 32.5(2)) with the witness then being
cross-examined and re-examined at trial. The weight given to witness
evidence will of course depend on the witness’s credibility, as well
as the other circumstances of the case. A party wishing to secure
evidence of a witness present within the jurisdiction to give oral evi-
dence at trial can also issue a witness summons under CPR 34.31
and 34.51.
The rules on expert evidence are set out in CPR 35 and the Chancery and Commercial Court guides. Expert evidence may only be given with the permission of the court, and follows exchange of witness statements from the witnesses of fact. Under CPR 35.3 the expert is subject to an express duty to help the court on the matters within his or her expertise, and this duty overrides any obligation to the party from whom he has received instructions. Expert evidence tends to be given in the form of a written report (eg, an economist’s report defining the relevant market, or a forensic accountant’s report on the loss suffered by the claimant). Following exchange of expert reports, written questions may be put to the expert by the other party. Experts will also be subject to cross-examination (and re-examination) at trial.

The court can also order that expert evidence be provided by a single expert appointed jointly (CPR 35.7). This is unlikely to be used much in competition cases, given their complexity.

CAT
In relation to factual evidence in proceedings in the CAT, the Tribunal held in Argos and Littlewoods v OFT [2003] CAT 16 that it will ‘be guided by overall considerations of fairness rather than technical rules of evidence’. Many factors, including whether the evidence in question is hearsay evidence, can affect the weight it is given (Aberdeen Journals v OFT [2003] CAT 11). As in the High Court, factual evidence in the CAT can include contemporaneous documents and written and oral evidence from witnesses. The CAT’s approach to witness statements is to give them such weight as seems appropriate in the circumstances, bearing in mind the extent to which cross-examination has been sought. Under CAT Rule 22, the CAT has the general power to control the evidence placed before it by giving directions as to the issues on which it requires evidence, the nature of the evidence it requires, and the way in which the evidence is to be placed before it. Expert evidence can be given in the CAT as it can before the High Court. Again, in the context of follow-on damages actions this involves the submission of expert reports, and experts may be cross-examined at trial. As set out in the CPR in relation to High Court proceedings, paragraph 12.9 of the CAT Guide states that the expert is subject to an overriding obligation to the Tribunal to assist on the matters within his or her expertise. Single joint experts may also be appointed in CAT proceedings, although as noted above it is unlikely that they would be in the context of complex follow-on damages claims (CAT Guide paragraph 12.8).

11 What evidence is protected by legal privilege?
There are two types of privilege in English law: legal advice privilege and litigation privilege. They apply in both High Court and CAT proceedings. The practical consequence of a document being privileged is that, while it must be included on a disclosure list (in the High Court), it is protected from disclosure.

Legal advice privilege
Legal advice privilege covers confidential communications between client and lawyer that have been entered into for the purpose of giving or receiving legal advice. There are three elements to this. First, the communication must be confidential – so anything that has come into the public domain or anything that has been circulated widely such that it can no longer be considered ‘confidential’, will not be privileged. Second, the communication must be between lawyer and client. Under English law, ‘lawyer’ includes both external and in-house counsel, provided they are authorised persons as defined by the Legal Service Act 2007 (ie, qualified in any jurisdiction). In this respect, English law is different from the position under EU law as confirmed by the ECJ in case C-530/07 P Akzo Nobel Chemicals Ltd and Akcrors Chemicals Ltd v Commission. Following Three Rivers (No. 5) [2003] EWCA Civ 474, the definition of ‘client’ is relatively restricted: in the context of an undertaking it may apply only to a unit or certain specific persons within the undertaking who are instructing the lawyers, rather than all employees within the undertaking. Third, the communication must be made for the purpose of giving or receiving legal advice. For example, communications between a lawyer (internal or external) and persons within the business discussing commercial issues but not providing legal advice in relation to them, will not be privileged.

Litigation privilege
Litigation privilege covers confidential communications between client and lawyer or between one of them and a third party which comes into existence after litigation is contemplated or has been started, and made with a view to obtaining or giving legal advice in relation to the litigation, obtaining evidence to be used in it, or obtaining information which may lead to the obtaining of evidence. These must be the sole or dominant purposes of the communications if they are to attract litigation privilege. This would cover, for example, correspondence with witnesses of fact, experts, reports and drafts etc made in the context of bringing or defending a follow-on damages action. Litigation would probably be considered to be ‘in prospect or pending’ at the stage of the Commission or OFT investigation, such that any documents produced would be covered by litigation privilege.

Privileged status of leniency applications and settlement agreements?
In relation to follow-on damages arising from a decision of the Commission or the OFT, any document submitted by the parties to the investigation to the regulator has arguably lost its ‘confidential’ status and may therefore not be privileged. Such documents would form part of the case file and therefore be disclosed to other parties as part of access to file. This may be of particular concern to leniency applicants or those who enter into settlement agreements, and who may face the prospect in follow-on damages actions of being required to disclose the application or agreement. The position taken by the Commission is that, as a matter of public policy, leniency applications must not be disclosed (paragraph 40 of the Leniency Notice (OJ 2006 C298/22)) as to do so risks jeopardising the attractiveness of making an application, and thereby threaten the leniency regime; this is also the position it has adopted in relation to settlement agreements (paragraph 40 of the Settlement Notice (OJ 2008 C167/6)). Indeed, in National Grid Electricity Transmission PLC v ABB Ltd and Others, the Commission submitted an amicus curiae observation in which it stated that:

The willingness of companies to provide comprehensive and candid information is crucial to the success of the leniency programme, which is the most effective tool at the Commission’s disposal for the detection of secret cartel. To this end, the Commission’s policy has been that undertakings which voluntarily cooperate with DG Competition in revealing cartels should not be put in a significantly worse position in respect of civil claims than other cartel members which refuse any cooperation. In practical terms, this means the Commission’s long established practice is that the corporate statements specifically prepared for submission under the leniency programme are given protection both during and after its investigation.

Furthermore, the European Competition Network (representing EU national competition authorities and the Commission) passed a resolution on the ‘Protection of leniency material in the context of civil damages actions’ (23 May 2012) in which it stated that the protection of leniency applications was ‘fundamental for the effectiveness of anti-cartel enforcement’.

Article 2 of Regulation 1049/2001 establishes a right of access to documents of the European institutions. However, the Commission has previously refused to disclose confidential versions of its decisions and the contents of its case file, relying on the public policy
exceptions to the right of access in article 4(2) of the Regulation. However, a number of Commission decisions relating to its refusal to disclose documents have recently been successfully appealed before the General Court.

In Case T-437/08 CDC Hydrogen Peroxide v Commission, CDC Hydrogene Peroxide had applied to the Commission under Regulation 1049/2001 for full access to the statement of contents of the case-file in its Hydrogen Peroxide and Perborate decision. The Commission provided a non-confidential version of the statement of contents but refused access to the confidential version. CDC Hydrogene Peroxide brought proceedings before the General Court seeking to annul the Commission’s decision not to grant it access to the confidential statement of contents.

In relation to the Commission’s reasons for refusing to provide the statement of contents, the General Court did not accept that the statement of contents formed part of the commercial interests of the companies involved in the cartel and nor did it accept the Commission’s argument that disclosure of the statement of contents would undermine the protection of the purpose of its investigations (ie, in determining whether a competition infringement had taken place and, if so, to penalise the companies responsible). In this case, on the date of the adoption of the Commission’s decision to refuse access to the document, the Commission had already adopted the cartel decision. Therefore, there was no investigation in progress which could have been jeopardised by the disclosure.

In Case T-344/08 EnBW Energie Baden-Württemberg v Commission the General Court also annulled the Commission’s decision to refuse access to documents relating to the Commission’s Gas Insulated Switchgear decision requested by EnBW under Regulation 1049/2001. The striking issue about the case is that, according to the Commission, the documents requested were wide ranging and included among other things: documents provided in connection with an immunity or leniency application, namely statements from the undertakings in question and all documents submitted by them in connection with the immunity or leniency application; requests for information and parties’ replies to those requests; documents obtained during inspections; the statement of objections and parties’ replies thereto; and internal documents including background notes, correspondence with other competition authorities, consultation of other Competition departments to have been involved in the case, and procedural documents including inspection warrants, lists of documents obtained in the course of inspections, file notes etc. The General Court’s judgment is subject to appeal (Case C-365/12).

Another Commission decision under Regulation 1049/2001 being appealed to the General Court is Case T-380/08 Kingdom of Netherlands v Commission.

Are private actions available where there has been a criminal conviction in respect of the same matter?

Under section 188 of the EA02 only an individual can be found guilty of the criminal cartel offence. Private damages actions, on the other hand, would tend to be brought against the company that has breached competition law.

Private actions are available where there has been a criminal conviction in respect of the same matter. The Marine Hose cartel is an example: in January 2009 the Commission fined a number of undertakings for their participation in the cartel, including Dunlop Oil & Marine. Following a plea-bargain process in the US, in June 2008 three Dunlop executives pled guilty and were convicted in the UK for their role in the cartel. In July 2009, the Libyan oil firm Waha Oil Company lodged a claim for damages against Dunlop in the High Court.

In Marine Hose, the criminal cases had already concluded by the time the follow-on litigation was brought. This need not necessarily be the case, although where a private action and criminal proceedings are brought at the same time, the private action may be stayed pend-}

ing the outcome of the criminal proceedings. In the Passenger Fuel Surcharge case a civil investigation by the OFT into British Airways and Virgin Atlantic regarding fixing of passenger fuel surcharges on transatlantic routes was stayed pending the outcome of the criminal prosecution it brought against four of the British Airways executives, which collapsed in May 2010. The OFT subsequently resumed its civil investigation, imposing a fine on British Airways.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

The claimant in a private action is required to prove all the elements of his claim, subject to the fact that a relevant OFT or Commission infringement decision will be taken as evidence that the infringement was committed. As such, the claimant will be required to show evidence of loss and causation in a follow-on claim and, in a stand-alone claim, evidence of the infringement as well. The fact that an individual has been convicted of a criminal offence is admissible in civil proceedings in order to prove the infringement has been committed, but this will just be one piece of evidence in establishing the infringement and will not, of course, assist in showing loss or causation.

The EA02 has specific rules governing the admissibility of evidence discovered in criminal proceedings. The OFT and the SFO, the bodies in the UK responsible for investigating the criminal cartel offence, are entitled to disclose information that has come to their attention in the course of a criminal investigation in specified circumstances only. They are not permitted to disclose such information to assist potential claimants seeking damages unless the information has already legitimately been disclosed to the public.

There are no specific provisions protecting leniency applicants from follow-on damages claims brought in England and Wales. In practice, the fact of being a leniency applicant raises two main issues relevant to follow-on claims: when the claim can be brought, and whether the leniency application is disclosable to claimants. The latter issue has been addressed above (see questions 9 and 11).

As to when a claim can be brought, it is clear that the UK courts (which include the CAT) cannot take decisions running counter to those of the Commission or judgments of the European courts (article 16 of Regulation 1/2003).

In the CAT, proceedings cannot be brought against an undertaking (without permission of the CAT) until the decision is final as against that undertaking (rule 31 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372)). The scope of this provision was limited, however, by the Court of Appeal’s judgment in BCL Old Co Ltd & Others v BASF SE & Others [2009] EWCA Civ 434, in which the court held that the two-year time period for bringing a follow-on claim in the CAT will start to run (and so permission to bring a follow-on claim is not required) where the appeal to the European courts relates only to the fine; only where the appeal relates to the substantive infringement finding does the limitation period not start to run (thereby requiring the CAT’s permission to bring a follow-on claim). In Emerson Electric and others v Morgan Crucible the claimants were able to commence proceedings against Morgan Crucible (the leniency applicant in the Commission’s Electrical and Mechanical Carbon and Graphite Products cartel decision), but could not commence proceedings against the other parties to the cartel until they had exhausted their avenues of appeal to the European courts (Emerson Electric and others v Morgan Crucible ([2007] CAT 30), judgment of 16 November 2007, and Emerson and others v Morgan Crucible and others ([2008] CAT 8))—although proceedings against Morgan Crucible were stayed by agreement pending the outcome of the appeals.

In the context of High Court proceedings, however, the distinction between leniency applicants and other parties to a cartel
appears to be of less significance. In *National Grid v ABB and Others* [2009] EWHC 1326, the court stayed a follow-on claim brought by National Grid against parties to the *Gas-Insulated Switchgear* cartel until three months after any appeal against the Commission’s infringement decision had been finally determined. (The court considered, however, that the defendants should serve their defences and that some limited disclosure and other pretrial steps could be taken in the meantime.) This applied to both the immunity applicant, ABB, and the other parties to the cartel who were defendants in the High Court proceedings.

The OFT and the Commission do not routinely disclose documents obtained in their investigations to private claimants.

**14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?**

National courts are under a duty not to take decisions running counter to those of the European Commission or courts (article 16 of Regulation 1/2003). Where a follow-on damages action is brought in the UK in circumstances where the underlying Commission decision is being appealed to the European courts, defendants may therefore apply for an action to be stayed pending the outcome of the appeal.

In proceedings in the High Court, there is no specific provision relating to competition litigation, but CPR 31.2(f) allows the court to stay proceedings as part of its general case management powers, and CPR part 23 provides for interim applications to be made to the court. Each application will be considered on its merits. As noted above, in *National Grid v ABB and Others* [2009] EWHC 1326 the defendants (which included ABB, the immunity applicant which was not appealing the Commission’s decision; and other addressees of the decision, who were appealing) requested a stay of the UK proceedings pending the outcome of appeals to the European courts. The High Court granted the stay (in respect of all the defendants), although it did order certain pretrial steps to be taken.

In proceedings in the CAT, while the Tribunal has case management powers that allow it to stay proceedings where appropriate (CAT Rule 19.1), the CA98 addresses the issue of potential conflicts between European and national decisions by preventing follow-on claims from being brought until a decision has become ‘final’ (ie, all avenues of appeal have been exhausted or the time for bringing such appeals has expired), unless the CAT grants permission for the claim to be brought (section 47A(7) of the CA98). As noted above, the outcome of the Court of Appeal’s judgment in *BCL Old Co Ltd & Others v BASF SE & Others* [2009] EWCA Civ 434 was that permission to bring a follow-on claim is limited to circumstances where the substance of the infringement finding is being contested, and is not required where an appeal relates only to the fine. In *Emerson I*, the claimant sought to bring a follow-on action in the CAT against Morgan Crucible, the leniency applicant in the Commission’s infringement case. Other addressees of the decision were appealing the decision, but Morgan Crucible, as the leniency applicant, was not. The CAT held that permission was required to commence proceedings where the underlying infringement decision was being appealed by any of the addressees (*Emerson Electric Co and others v Morgan Crucible and others* [2007] CAT 28). However, in *Emerson II*, the CAT granted permission for the action to be brought against Morgan Crucible – although it indicated that proceedings may be stayed prior to the case coming to trial, and proceedings were in any event stayed against Morgan Crucible by agreement (*Emerson Electric and others v Morgan Crucible* [2007] CAT 30). In *Emerson III*, the claimants went back to the CAT to ask for permission to bring proceedings against the other parties to the Commission’s infringement decision who were appealing to the European courts, but permission was refused (*Emerson and others v Morgan Crucible and others* [2008] CAT 8).

**15 What is the applicable standard of proof for claimants and defendants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?**

The burden of proof in private antitrust litigation falls on the claimant to establish that there has been an infringement, loss and causation. In relation to the infringement aspect, a decision of the OFT or European Commission (upheld on appeal where applicable) will be conclusive evidence of the infringement. It therefore falls to the claimant to prove causation and loss in a follow-on damages claim, and to prove the entire infringement as well as causation and loss in the case of a stand-alone claim.

The standard of proof in competition litigation cases, as for all civil claims, is the ‘balance of probabilities’ (ie, more likely than not). The High Court in *Attheraces v British Horseracing Board* [2005] EWHC 3015 held that while the standard of proof is the civil standard of balance of probabilities, the seriousness of an infringement of the competition rules required the proof of evidence to be ‘compensateably cogent and convincing’. This is sometimes referred to as a ‘heightened civil standard’, though it is in fact nothing more than the courts requiring evidence commensurate with the severity of the infringement finding, as is the case in all civil claims.

The Department for Business Innovation and Skills consultation document ‘Private Actions in Competition Law: A Consultation on Options for Reform’ (April 2012) contains a proposal to introduce a rebuttable presumption of loss in cartel cases, the current suggestion being that there would be a presumption that a cartel had affected prices by 20 per cent.

In relation to passing-on defences, see question 35.

**16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?**

**High Court**

The timetable in the context of a private antitrust action in the High Court will depend on the nature of the proceedings and the complexity of the case. In relation to a follow-on damages case, much will depend on: whether proceedings are stayed (see above); how extensive disclosure is; the number of witnesses; and other such issues. In relation to a stand-alone claim, again the complexity of the issues will largely determine the typical timetable. The practice in high value claims assigned to the ‘multi-track’ procedure under the CPR is to have a case management conference after close of pleadings (CPR 29.3), in which a timetable to trial is agreed or ordered, which sets deadlines for the various stages in the proceedings (eg, disclosure, exchange of witness statements and expert reports). Cases may be expedited where circumstances warrant it (see, for example, the Admiralty and Commercial Courts Guide, section J1), but this will be rare for a damages claim.

In addition to expedition, cases in the High Court can be subject to strike-out or summary judgment applications where the statements of case disclose no cause of action or the claimant or defendant has no real prospect of success (CPR parts 3 and 24). For example, a margin squeeze allegation made under article 101 TFEU was summarily dismissed by the High Court in *Unipart v O2* [2002] EWHC 2549 within three months of the claim being issued. On the other hand, in *Adidas v ITF* [2006] EWHC 1318 the court held the complexity of the competition law issues meant that striking out the claim or defence would be inappropriate.

Issues may also be tried as ‘preliminary issues’ where to do so could allow the court to dispose of proceedings expeditiously (see, for example, the Chancery Guide, paragraph 3.15 and CPR 3.1), by having off a specific issue that can be dealt with discretely and that would allow the action to be determined without recourse to a full trial on all the issues.
The duration of proceedings in the CAT will again depend on the circumstances and complexity of the case. To date, only two follow-on actions have reached judgment in the CAT, namely Enron Coal Services Limited v English Welsh & Scottish Railway Limited (Case 1106/5/7/08) and 2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited (Case 1178/5/7/11). In Enron, the claim form was filed in November 2008 and judgment was handed down in December 2009 ([2009] CAT 36). In 2 Travel, the claim form was filed in January 2011 and judgment was handed down in July 2012 ([2012] CAT 19). Contrast this, for example, with the follow-on action in the Emerald litigation: the claim was lodged in February 2007, and proceedings are still ongoing.

Collective actions before both the CAT (under section 47B of the CA98) and the High Court may take longer because of increased case management burdens. In the only representative action brought to date in the CAT (Consumers’ Association v JJB Sports, following on from the OFT’s Replica Kit decision), the claim was lodged in March 2007 but was settled and withdrawn in January 2008.

17 What are the relevant limitation periods?

High Court
In civil claims brought in the High Court (which includes private antitrust litigation), the limitation period is six years from the date on which the cause of action accrued (Limitation Act 1980). The cause of action continues to accrue until the date the infringement of competition law ceases, so the limitation period will expire six years from the date on which the infringement ends. Follow-on claims based on Commission or OFT decisions relating to infringing conduct more than six years old would therefore be time-barred. However, where there is deliberate concealment the six-year period will not begin to run until such time as the claimant either discovered the concealment or ought reasonably to have discovered it. In relation to claims pertaining to cartel activity (that is likely to have been secret or concealed, or both), this may, depending on the facts of each case, extend the limitation period until, for example, the date on which the cartel activity was made public, such as an announcement by the competition regulator that it was investigating the infringement.

CAT
In the CAT, a follow-on claim can be brought up to two years from the later of the date on which the substantive infringement decision becomes final and is no longer appealable, or the date on which the action accrued (section 47A(7) and (8) of the CA98). As such, an infringement decision of the Commission or OFT that is not appealed within the required time limit will become final; where an appeal is lodged the limitation period will not start to run until the appeal has been determined and no further appeals are possible. As noted above, the Court of Appeal in BCL Old Co v BASF [2009] EWCA Civ 434 held that there is a distinction between an appeal of a substantive decision that concerns only the imposition of a fine and appeals relating to the substance of the infringement finding. In relation to the former, section 47A does not extend the limitation period (which will therefore start to run from the date on which the deadline to lodge an appeal expired), but if an appeal relates to the substance then the limitation period may be extended (until the appeal has been determined and no further appeal is possible). In a separate judgment in BCL Old Co v BASF [2010] EWCA Civ 1258, the Court of Appeal held that the CAT does not have the power to extend the limitation period for follow-on claims brought under section 47A of the CA98. This latter decision is on appeal to the Supreme Court.

In Deutsche Bahn AG v Morgan Crucible Company plc [2011] CAT 6, the CAT held that the limitation period must be determined in relation to each defendant individually. As such, the CAT held that an action brought against Morgan Crucible in December 2010 on the basis of the Commission’s Electrical and Mechanical Carbon and Graphite Products decision of December 2003 was brought out of time: in circumstances where Morgan Crucible had not appealed the decision, the limitation period in respect of damages claims brought against it began to run from the deadline for filing an appeal to the European courts (in February 2004) and expired two years later (in February 2006). The CAT’s judgment was, however, reversed on appeal by the Court of Appeal ([2012] EWCA Civ 1055). That court held that the limitation period must be determined in relation to the infringement decision as a whole, as opposed to in relation to each defendant individually. As such, the limitation period began to run when all appeals against the infringement decision had been determined. As some of the undertakings appealed the infringement decision to the General Court, time in fact began to run from the deadline for appealing to the ECJ (18 December 2008) and expired two years later (18 December 2010). As the damages claim was filed on 15 December 2010, it was in time. The Court of Appeal’s judgment is subject to appeal.

18 What appeals are available? Is appeal available on the facts or on the law?

Judgments of the CAT (section 49(1)(b) of the CA98) and the High Court may be appealed to the Court of Appeal, provided the permission of the lower court or the Court of Appeal has been obtained. CPR 52.11(3) provides that appeals can be made on the basis that the lower court was either wrong, or unjust because of a serious procedural or other irregularity. Appeals can be made either by a party to the proceedings or by someone who has a sufficient interest in the matter. This was widely interpreted by the CAT in English Welsh and Scottish Railways v Enron Coal Services [2009] EWCA Civ 647, where the Court of Appeal held that it had jurisdiction to hear an appeal against the CAT’s refusal to strike out part of the claim for damages.

A further appeal from the Court of Appeal to the Supreme Court (formerly the House of Lords) is possible, again provided permission is granted either by the Court of Appeal or the Supreme Court. In addition to appeals, the High Court or the CAT can stay proceedings and refer a question to the ECJ under the preliminary ruling procedure set out in article 267 TFEU.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

Class actions in the US sense (ie, ‘opt-out’ actions) are not available in England and Wales. However, collective proceedings can be brought in the sense of multiparty claims or ‘opt-in’ actions by designated bodies (currently, in the UK, the Consumers’ Association).

High Court
In the High Court, CPR 19.6(1) allows a representative action to be brought by a claimant representing himself and other claimants, thereby avoiding the need for those persons to issue their own claim form. Representative proceedings can be brought where more than one person has the ‘same interest’ in a claim and the interested persons must opt in to the action to participate.

It is difficult to bring a representative action in the context of private antitrust litigation, as is shown in Emerald Supplies Limited v British Airways plc [2009] EWHC 741. The claimants in that case were cut flower importers who were direct and indirect customers of BA’s airfreight services. They alleged that they had paid inflated air freight prices as a result of a price-fixing cartel to which BA and other airlines were party, and claimed damages for themselves and other importers of cut flowers who they purported to represent. The High Court struck out the action on the basis that: the class of direct and indirect purchasers was too ill-defined for the purposes of CPR 19.6,
as the criteria for inclusion in the class depended on the outcome of the claim itself (i.e., whether they were indeed purchasers of services at inflated prices); and the direct and indirect purchasers would not all benefit from the relief sought by the claimant, because of the need for direct purchasers to pass on the overcharge to indirect purchasers in order for the latter to benefit from damages awarded. The Court of Appeal in Emerald Suppliers Ltd v British Airways plc [2010] EWCA Civ 1284 confirmed the High Court’s decision, rejecting the move to engineer such a class-action mechanism. The Court held that the appellant and those it purported to represent did not all have ‘the same interest’ required by CPR 19.6: they were not defined in the pleadings with a sufficient degree of certainty to constitute a class of persons with ‘the same interest’ capable of being represented by the appellant. The potential conflicts arising from the defences that could be raised by British Airways to different claimants reinforced the fact that they did not have ‘the same interest’ and that the proceedings were not equally beneficial to all those to be represented.

Group litigation orders (GLOs) are also available in the High Court (CPR 19.11). GLOs are made where one or more claims raise ‘common or related issues’, and are ordered by the court to consolidate proceedings commenced by two or more claimants bringing separate actions. In practice, GLOs are rarely used, and have not been used in the context of competition litigation to date.

CAT

In the CAT, section 47B of the CA98 provides for designated bodies to bring opt-in actions on behalf of consumers. In the UK, the only designated body to date is the Consumers’ Association.

Representative actions in the CAT have had limited success to date. Following on from the OFT’s decision in Replica Kit, the Consumers’ Association brought an action in the CAT under section 47B on behalf of consumers who had purchased the overpriced football shirts. Relatively few consumers signed up to the action, and the case settled. No other representative actions have been brought in the CAT to date.

The Department for Business Innovation and Skills consultation document ‘Private Actions in Competition Law: A Consultation on Options for Reform’ April 2012 contains a proposal to introduce an opt-out mechanism for cases in the CAT.

20 Are collective proceedings mandated by legislation?

In the High Court the applicable rules for collective actions are set out in the Civil Procedure (Amendment) Rules SI 2000 No. 221. The relevant rules of the CPR are set out above. As noted above, a limited form of class action before the CAT is provided for by section 47B of the CA98.

21 If collective proceedings are allowed, is there a certification process? What is the test?

High Court

As there is no equivalent in England and Wales of the US-style (opt-out) class action procedure, nor is there a similar certification process. In relation to representative proceedings, it is necessary for the claimant representing others who have the same interest in the claim to show the ‘same interest’ test is satisfied. The Court of Appeal’s judgment in Emerald Suppliers Ltd v British Airways plc [2010] EWCA Civ 1284 has shown that this will be difficult in the context of follow-on damages claims.

In relation to GLOs, an order can be made either of the court’s own motion or following a request from a claimant or defendant. GLOs are made where one or more claims raise ‘common or related issues’, a concept which is wider than the requirement that the persons have the ‘same interest’ for representative proceedings.

CAT

A claim brought under section 47B of the CA98 by the Consumers’ Association on behalf of two or more consumers requires each consumer to have given his or her consent to the claim, and requires the claims to relate to the same infringement. Beyond this, no specific certification process is required.

22 Have courts certified collective proceedings in antitrust matters?

See above. The Consumers’ Association brought the first (and only) representative action under section 47B of the CA98 in the CAT in March 2007, which settled. No other collective proceedings have been brought in the CAT. In the High Court, Emerald Supplies Limited’s attempt to bring a quasi ‘class action’ was rejected at first instance – a decision that was upheld by the Court of Appeal.

23 Can plaintiffs opt out or opt in?

As noted above, representative and group actions in England and Wales require claimants to ‘opt in’ rather than ‘opt out’ of the claim. This is in contrast to, for example, the way claims can be brought in the US.

Both the European Commission’s White Paper and the OFT’s paper entitled ‘Private actions in competition law: effective redress for consumers and business – recommendations’ (November 2007) have effectively proposed that an opt-out mechanism should be adopted, in large part so as to encourage the enforcement of competition law via private antitrust litigation. The UK’s Department for Business Innovation and Skills consultation ‘Private Actions in Competition Law: A Consultation on Options for Reform’ (April 2012) contains a proposal to introduce an opt-out mechanism for cases in the CAT (see question 1 for more details). The European Commission’s Directive on private antitrust claims is anticipated in the next 12 months.

24 Do collective settlements require judicial authorisation?

Settlement agreements entered into between parties to litigation do not require the consent of the court or CAT. In normal circumstances, the claimant can then withdraw (discontinue) the claim unilaterally. Note, however, that in proceedings brought by more than one claimant, if a settlement is entered into with one of the claimants the consent of either the other claimants or the court is required (CPR 38.2(2)(c)).

Settlements should include a provision for payment of costs, or state that each party is to bear its own costs. In the High Court, where a claimant discontinues the claim, it is required to pay the defendant’s costs (CPR 38.6). In the CAT, a claimant may only withdraw the claim prior to the hearing with the consent of the defendant or with the permission of the president. Where a claim is withdrawn, the Tribunal may make any consequential order it thinks fit (paragraph 14.5 of the CAT Guide to Proceedings).

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Claims can be brought separately in England and Wales, Scotland and Northern Ireland. The courts of each jurisdiction cannot order the claims brought in other jurisdictions to be consolidated.

However, if simultaneous proceedings are commenced across the different jurisdictions, it is open to the defendants to challenge the jurisdiction of one of the courts on the basis that the other one is the more appropriate forum for resolution of the dispute. It is also likely to be in the claimant’s interests (in terms of both costs and expedi-
ency) to bring their claims in one jurisdiction. This applies not just within the UK but also across Europe, to the extent that it is likely to be more cost-effective and efficient for a claim to be heard in one European jurisdiction in relation to losses the claimant suffers as a result of a pan-European infringement of the competition rules. Claimants are wise to these efficiencies: see, for example, the efforts to which the claimant in *Promax v Aventis* went in order for all its European claims to be heard in the English courts (see question 5).

England and Wales is regarded as a single jurisdiction. It is possible to bring simultaneous proceedings in each of England and Wales, Scotland and Northern Ireland.

### Remedies

#### Follow-on actions

Follow-on actions are based on the tort of breach of statutory duty (see question 2) and damages are awarded on the tortious basis (ie, the amount of the loss, plus interest). This is in line with ECJ case law (*Manfredi v Lloyd Adriatico*, Case C-295/04, [2006] ECR I-6619) which requires injured persons to be able to seek compensation not only for actual loss but also lost profit and interest. Only one follow-on claim in the CAT has resulted in a final award of damages (*2 Travel Group*, discussed further below), although a number of cases in the English courts have addressed the issue. This is not surprising in circumstances where the vast majority of commercial disputes settle before judgment.

How damages might be calculated in a competition law claim will depend on the facts of the case. In *Crehan v Intreprenaire Pub Company* [2003] EWHC 1510, the High Court considered that if there had been a breach of the competition rules the damages awarded would have been for losses actually suffered, profits and interest up to the date of the judgment; the Court of Appeal considered this approach to be too speculative and held that damages should be assessed as at the date of loss. In any event, the decision to award damages was overturned by the House of Lords, which did not therefore need to rule on which would have been the correct measure of damages.

In *Arkin v Borchard Lines Limited (No. 4)* [2003] EWHC 687, the judge considered that an assessment of damages would involve considering what loss, if any, the infringement had as a matter of ‘common sense’ directly caused to the claimant (although he held that, on the facts, there had been no breach of the competition rules). For this purpose, it would be necessary to consider the ‘counterfactual’, ie, what the market conditions would have been like without the infringement, and the likely difference between the price actually paid and the price that would have been paid in such a competitive market.

In *Enron Coal Services v English Welsh and Scottish Railways* [2003] EWHC 687, the Tribunal concluded that there was no loss at all because on the counterfactual the claimant would have been no better off.

The measure of damages awarded will depend on the nature of the infringement. In relation to a cartel, the damages should be the cartel overcharge, adjusted as necessary for pass-on. In relation to exclusionary abuses, the damages should be the profit that the claimant would have made had it not been excluded from the market or marginalised by the infringing conduct. In December 2009 Oxera published a paper for the European Commission in relation to the calculation of quantum in competition law claims. The paper may be useful to judges awarding damages in such claims, but it is not anticipated that it will provide a shortcut to the detailed damages assessment necessary in the event damages are awarded. Rather, the paper’s usefulness in English litigation is likely to be as an indication of the Commission’s position, that being just one of the factors the court would take into account in determining the level of damages to be awarded.

In relation to stand-alone claims, compensation may be sought for infringements that must be proved de novo and would be awarded on the same basis as follow-on damages actions noted above. In addition, other ‘compensation’ may be sought, as to which see question 29.

In the CAT, an order for interim relief was made in *Healthcare at Home v Genzyme* [2006] CAT 29. The case involved a margin squeeze by the supplier of a particular drug; the CAT’s judgment specified the percentage discount that should have been applied to the supplier’s pricing to ensure a reasonable profit margin. A purchaser claimed the value of the percentage discount against the amount purchased, plus exemplary damages. The CAT considered that, if the claimant could demonstrate the effects of the infringement had continued past the period of infringement found, damages could extend for that longer period. The CAT accepted that lost profit margin was an appropriate measure of damages, and made an interim award based on the likely percentage discount that it would find should have been charged. The case settled before final judgment.

In *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 the High Court held that claimants are entitled to compensatory damages but not to exemplary or restitutionary damages, or to an account of profits, as to make such an award in circumstances where fines have been imposed by the regulator for competition law infringements (or reduced or waived in the case of leniency and immunity applicants) would be inconsistent with the principles of nemo dicit, idem, the principle that national courts should not run counter to decisions of the Commission, or the rule against double jeopardy. On appeal in relation to the restitutionary damages and account of profits issue, the Court of Appeal confirmed that claimants are not entitled to restitutionary damages, or to an account of profits ([2008] EWCA Civ 1086). As such, they are entitled to be compensated for the loss they have suffered, but are not entitled to any further damages that would punish the defendant for its wrongdoing (exemplary damages) or to be awarded the unlawful gain that the defendant made by infringing the competition rules (restitution or account of profits). It remains to be seen whether exemplary damages would be available in stand-alone actions where there has been no prior fine imposed by the Commission or the OFT.

However, in *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19, the only follow-on claim to have resulted in a final award of damages, the CAT held that 2 Travel was entitled to both compensatory and exemplary damages. The CAT approached the compensatory damages assessment on the basis of what the market conditions would have been without the infringement. The CAT awarded damages to 2 Travel for loss of profits from the date the infringement commenced up to the date of 2 Travel’s liquidation (the infringement ended shortly thereafter), finding that, ‘but for’ the infringement, 2 Travel would have made a further profit from its operations. However, the CAT declined to award damages in relation to loss of a capital asset, loss of a commercial opportunity and the costs of 2 Travel’s liquidation as these would have been incurred in any event absent the infringement due to pre-existing and ongoing financial and management difficulties. Further, the CAT declined to award damages in relation to wasted management time in dealing with the abuse, as on the facts there was no abnormal waste of time.

In relation to exemplary damages, 2 Travel sought exemplary damages on two counts: (i) ‘Oppressive, arbitrary or unconstitutional conduct by servants of the government’; and (ii) ‘Conduct calculated to make a profit that may well exceed the compensation payable to
the Claimant. While the CAT rejected a claim under the first ground on the basis that Cardiff City Transport Services did not exercise government functions, it did award damages under the second ground, finding that Cardiff City Transport Services had acted in knowing disregard of an appreciated and unacceptable risk that the chapter II prohibition of the CA98 was either probably or clearly being breached or it had deliberately closed its mind to that risk. The CAT distinguished this case from Devenish on the grounds that while there had been a previous OFF decision, like in Devenish, Cardiff City Transport Services had been granted immunity from fines by the OFF on the basis of it being conduct of minor significance, rather than pursuant to a leniency regime. As such, the CAT held that there was no policy reason why exemplary damages should not be imposed. Given this distinguishing feature, it appears that exemplary damages will still be unavailable in most follow-on damages cases where a fine has been imposed by the regulator (one which may of course have been reduced or waived in the case of leniency and immunity applicants). The CAT’s approach to awarding exemplary damages was to take into account the following factors: that the exemplary damages should bear some relation to the compensatory damages awarded; the economic size of Cardiff City Transport Services; and the fact that Cardiff City Transport Services would no doubt take very full account of the CAT’s judgment even if the exemplary damages were quite low given its association with a local authority.

28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

High Court

Aside from damages, claimants can seek injunctions in the High Court in respect of either an ongoing or anticipated breach of competition law (CPR part 25). Prohibitory injunctions (requiring the defendant to refrain from conduct), mandatory injunctions (requiring a defendant actively to do something) and quia timet injunctions (restraining the defendant from engaging in future actions) are all available. To succeed in being awarded an interim injunction, the applicant must show it has a good arguable case, and that damages would be inadequate to remedy its losses (American Cyanamid v Ethicon Ltd [1975] AC 396). Where an interim injunction is sought, it is necessary for the applicant to give a cross-undertaking in damages to cover any loss suffered by the defendant as a result of the injunction in the event of the applicant losing the case.

Timing is a critical issue. In AAH Pharmaceuticals v Pfizer Limited & Unichem Limited [2007] EWHC 565, the High Court refused to award an interim injunction in circumstances where eight wholesalers sought to prevent Pfizer terminating supply agreements with them but brought their injunction application a month before implementation of Pfizer’s proposals, even though they knew of Pfizer’s proposal six months in advance. The last-minute nature of the application and the complexity of the analysis required to establish whether Pfizer’s actions were anti-competitive caused the court to refuse the wholesalers’ application.

An example of a prohibitory injunction is Adidas v ITF [2006] EWHC 1318, in which Adidas successfully argued that the International Tennis Federation’s restriction on the size of logos applied to tennis players’ uniforms was an abuse of its dominant position and obtained interim relief against the application of the restriction at that year’s tournaments. From Adidas’ point of view, this allowed it to pursue its objective (ie, changing the rules rather than receiving damages). An example of a mandatory injunction is Software Cellular Network Ltd v T-Mobile Limited [2007] EWHC 1790, in which Truphone obtained an injunction obliging T-Mobile to purchase services on the basis that T-Mobile’s refusal to activate relevant numbers amounted to an abuse of a dominant position (even though T-Mobile had only a 20 to 30 per cent market share and there was no precedent for such a refusal to purchase a service being characterised as an abusive refusal to supply).

The High Court can also award security for costs (CPR 25) in certain circumstances where the claimant is outside the jurisdiction.

CAT

Interim relief in the form of interim payments may be sought from the CAT (CAT rule 46). Such an order would require the defendant to make a payment on account of any damages (excluding costs) for which the CAT may hold the defendant liable. The conditions for such an award to be made are the defendant against whom the order is sought has admitted liability to pay damages to the claimant, and the Tribunal is satisfied that, if the claim were to be heard, the claimant would obtain judgment for a substantial amount of money (excluding costs) against the defendant. In Healthcare at Home v Genzyme Ltd [2006] CAT 29 that CAT ordered an interim payment of £2 million to be made to the claimant in the context of proceedings brought following on from an OFF finding that Genzyme had operated an unlawful margin squeeze in breach of chapter B of the CA98.

The CAT can also order security for costs in the context of follow-on damages actions (CAT rule 45), in circumstances similar to those set out in CPR 25 for claims in the High Court. Indications to date suggest the CAT will consider in particular whether a costs order is ultimately likely to be made: in BCL Old Co v Aventis [2005] CAT 2 the Tribunal declined to award security for costs primarily because it was not satisfied there was a substantial likelihood that the defendants would in due course benefit from a costs order.

Punitive and exemplary damages are available in certain limited circumstances in England and Wales. The ECJ in Manfredi v Lloyd Adriatico (Case C-295/04 [2006] ECR I-6619) held that interest should be available in respect of claims for damages based on infringements of competition law (the principle of equivalence). The English courts have discretion to order simple interest on damages awarded. The applicable rate is normally the claimant’s borrowing rate, as assessed by the court. In the absence of such evidence a fair commercial rate would be applied. In addition, the claimant’s or the defendant’s interest can obtain compound interest if it can prove actual losses (eg, if it can show that it has in fact had to borrow money and pay interest on it). The CAT may also order that interest is payable on damages awarded by it for all or any part of the period between the date when the action arose and the date of decision of the award for damages. Unless the CAT directs otherwise, the rate of interest must not exceed 8 per cent. In practice, the High Court, the CAT will usually apply the claimant’s cost of borrowing (see rule 56 of the CPR part 25). Prohibitory injunctions (requiring the defendant to refrain from conduct), mandatory injunctions (requiring a defendant actively to do something) and quia timet injunctions (restraining the defendant from engaging in future actions) are all available. To succeed in being awarded an interim injunction, the applicant must show it has a good arguable case, and that damages would be inadequate to remedy its losses (American Cyanamid v Ethicon Ltd [1975] AC 396). Where an interim injunction is sought, it is necessary for the applicant to give a cross-undertaking in damages to cover any loss suffered by the defendant as a result of the injunction in the event of the applicant losing the case.

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An example of a prohibitory injunction is Adidas v ITF [2006] EWHC 1318, in which Adidas successfully argued that the International Tennis Federation’s restriction on the size of logos applied to tennis players’ uniforms was an abuse of its dominant position and obtained interim relief against the application of the restriction at that year’s tournaments. From Adidas’ point of view, this allowed it to pursue its objective (ie, changing the rules rather than receiving damages). An example of a mandatory injunction is Software Cellular Network Ltd v T-Mobile Limited [2007] EWHC 1790, in which Truphone obtained an injunction obliging T-Mobile to purchase services on the basis that T-Mobile’s refusal to activate relevant numbers amounted to an abuse of a dominant position (even though T-Mobile had only a 20 to 30 per cent market share and there was no precedent for such a refusal to purchase a service being characterised as an abusive refusal to supply).
31 Are the fines imposed by competition authorities taken into account when settling damages?

The High Court’s judgment in Devenish Nutrition Limited v Sanofi-Aventis and others [2007] EWHC 2394 shows that where fines have been imposed by competition authorities (or not imposed because the defendant was a leniency applicant), neither punitive or exemplary damages, nor restitution or account of profits, will be available in follow-on damages claims. The Court of Appeal upheld the judgment as regards restitution or account of profits ([2008] EWCA Civ 10). Note, however, the CAT’s award of exemplary damages in 2 Travel ([2012] CAT 19) where the defendant had been granted immunity by the OFT on the basis of conduct of minor significance.

As the normal measure of damages in the English court is compensatory, the fact that fines have been imposed by the competition regulator would not normally lead to a reduction in the damages awarded.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

High Court

The rules on costs in the High Court are set out in CPR 43 to 48 and the accompanying Practice Directions. The basic rule is that costs follow the event, ie, the unsuccessful party pays the costs of the successful party (CPR 44.3(2)(a)). However, the courts have a general discretion in awarding costs, and will have regard to all the circumstances of the case including: the conduct of the parties; whether a party was partially successful; and any payment into court or settlement offer that is drawn to the court’s attention. Note that even where a costs order is made, the successful party is generally only likely to recover around two thirds of its costs.

In exceptional cases, a successful party may seek a costs order against a third party, for example if a third party has helped to fund litigation on behalf of the losing party. However, following Arkin v Borchard Lines Limited [2005] EWCA Civ 655 it is necessary in this respect to distinguish between ‘pure funders’ (who have no interest personally in the litigation and do not stand to benefit from it) and professional funders. The court in Arkin held that costs orders would not be made against pure funders; against professional funders costs orders may be made to the extent of the funding provided.

In addition, in rare cases a ‘wasted costs’ order may be made to hold legal representatives personally liable for costs. Wasted costs orders are imposed to punish lawyers for wasting the court’s time, for example in cases of serious improper, unreasonable or negligent acts or omissions in the course of the litigation.

CAT

CAT Rule 55 and paragraph 16 of the CAT Guide address the issue of costs. They provide that the Tribunal may, at its discretion, make any order it thinks fit in relation to the payment of costs. This is in contrast to the provisions in relation to the High Court: in the CAT there is no general rule that costs follow the event.

In Emerson Electric v Morgan Crucible, a costs order was made in favour of proposed defendants who succeeded in opposing the claimant’s application for permission to make a follow-on damages claim before the end of the period referred to in section 47A(8)(b) of the CA98 ([2008] CAT 8 (permission); [2008] CAT 28 (costs)). The CAT ordered that the claimants should pay the proposed defendants sums representing 50 per cent of the proposed defendants’ costs of the applications for permission.

33 Is liability imposed on a joint and several basis?

Although the point has not been decided, it is generally understood that in cases before both the CAT and the High Court, liability is likely to be joint and several in respect of defendants in a cartel action.

The Commission’s White Paper and the Department for Business Innovation and Skills consultation ‘Private Actions in Competition Law: A Consultation on Options for Reform’ (April 2012) have both raised the possibility of removing joint and several liability for infringers who have been granted leniency, so as not to encourage whistle-blowing and risk jeopardising the effectiveness of the leniency regime.

34 Is there a possibility for contribution and indemnity among defendants?

In England and Wales there is provision for contribution proceedings to be brought under the Civil Liability (Contribution) Act 1978, which allows any person liable for damage suffered by another to recover a contribution from a third party who is also liable in respect of the same damage. Contribution proceedings may be brought by a defendant joining another party or parties to the action, or by bringing contribution proceedings against them after judgment has been made. In relation to the Emerald Supplies case (Emerald Supplies and another v British Airways Plc [2009] EWHC 741), British Airways is being sued in the High Court for damages allegedly sustained by the claimants in relation to a cartel in which British Airways and a number of other airlines are alleged to have infringed competition law. Prior to the issuance of the Commission’s cartel decision, British Airways sought to join 32 other airlines to this action, not all of which were ultimately addressees of the Commission decision (British Airways later discontinued its attempts to join the airlines that were not addressees of the Commission decision).

How liability is apportioned between defendants is a matter for the court, which will make such award as it considers just and equitable in light of each person’s actual responsibility. It remains to be seen whether the court will consider parties to a cartel to be liable in equal proportions, or whether damages will be apportioned — for example according to ‘culpability’ in relation to the operation of the cartel (eg, if one party was the ringleader), or according to the amount of sales each party made to the claimant.

The status of leniency applications and settlement agreements with the Commission or OFT has been the subject of dispute in the context of High Court proceedings in recent years. The recent ECJ case C-360/09 Pfleider v Bundeskartellamt and the judgment of the High Court in National Grid Electricity Transmission PLC v ABB Ltd and Others [2012] EWHC 869 have gone some way to clarifying the position in relation to the disclosure of documents submitted to national competition authorities and the European Commission under their leniency regimes. The Commission is planning to adopt a directive in relation to antitrust damages actions. The directive is aimed at, among other things, implementing common rules as regards access to evidence and protection of leniency programmes in the context of antitrust damages actions brought before national courts.
Is the ‘passing on’ defence allowed?

It is generally understood that the passing-on defence, if it can be proved in fact (and perhaps with the assistance of expert evidence), is available to defendants, though there has been no definitive judgment on this point to date.

The judgment of the ECJ in Manfredi v Lloyd Adriatico (Case C-295/04 [2006] ECR I-6619) holding that indirect claims should be permitted indicates that, logically, the passing-on defence should be permitted. In addition, the Commission’s White Paper (COM (2008) 165 final) acknowledged that a presumption that an overcharge has been passed on (something the White Paper advocated) also logically suggests that the passing-on defence should be allowed.

In the CAT, the passing-on defence was considered in an interlocutory decision regarding security for costs in the BCL cases (Case No. 1028/5/7/04), but the matter was not decided in the CAT’s judgment. The Enron Coal Services v English Welsh and Scottish Railways case ([2003] EWHC 687) failed because the claimant had been unable, on the facts, to show that it suffered loss attributable to the defendant’s conduct (ie, the claim failed on causation), not because of any passing-on defence that the defendant successfully made.

Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

In English law the ex turpi causa doctrine means that a person may not benefit from relief (eg, damages) where to do so would enable him to benefit from his own illegality. This would prevent a claimant from recovering damages in respect of his own illegal activity. In Gibbs Mew v Gemmell [1999] ECC 97 the court held that a party to an anti-competitive agreement under what is now article 101(1) TFEU is prevented from recovering damages in respect of loss suffered as a result of that agreement. That judgment predates the ECJ’s judgment in Crehan v Courage (Case C-453/99, [2001] ECR I-6297) which held that a party to a contract that infringes article 101 TFEU can rely on a breach of that provision to obtain relief before a national court despite the existence of a national rule denying a person the right to rely on his own ‘illegality’ to obtain damages, in circumstances where the parties are not in positions of equivalent bargaining power.

In relation to the Safeway litigation, in which Safeway issued proceedings against its former directors and employees alleging breach of contract and negligence, seeking to recover the full amount of the fine from its directors and employees, the defendants applied for the claim to be struck out on the basis of ex turpi causa on the basis that Safeway had to rely on its own illegality (ie, the infringing conduct) in order to bring the claim. Although the application was refused at first instance (Safeway Stores Ltd & Others v Twigger & Others [2010] EWHC 11), the Court of Appeal was unanimous in holding that Safeway’s claim should be struck out (Safeway Stores Ltd & Others v Twigger & Others [2010] EWCA Civ 1472). The court concluded that the ex turpi causa maxim applied to preclude Safeway from seeking to recover from the defendants either the amount of the penalty imposed by the OFT or the costs incurred as a result of the OFT’s investigation. An undertaking that infringes provisions of the Competition Act 1998 relating to anti-competitive activity and is fined by the OFT therefore cannot recover the amount of such penalties from its directors or employees whose actions allegedly caused the infringement.

Is alternative dispute resolution available?

ADR is available in England and Wales. CPR 1.4 specifically refers to ADR, and requires the court to further the overriding objective by actively managing cases, with active case management including ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure’.

Competition law issues are arbitrable if the claim alleging an antitrust infringement falls within the ambit of a contractual arbitration clause: in ET plus SA v Welter ([2005] EWHC 2115) the High Court considered that there was no realistic doubt that anti-trust claims were arbitrable; and the Court of Appeal in Attheraces Limited v British Horseracing Board ([2007] EWCA Civ 38) has also emphasised the positive benefits of arbitrating competition disputes.

The CAT appears to be less willing to embrace arbitration. In Claymore Dairies v OFF (2006 CAT 3) the Tribunal emphasised the public law nature of the CA98 (ie, that proceedings before the Tribunal are there also to protect the public interest). Where parties in the CAT wish to withdraw their dispute and transfer to private arbitration, it is necessary to obtain the Tribunal’s consent to a stay of the proceedings – although proceedings can be withdrawn without the Tribunal’s permission, provided the defendant gives consent (see paragraph 14.5 of the CAT Guide to Proceedings).

The Department for Business Innovation and Skills consultation document ‘Private Actions in Competition Law: A Consultation on Options for Reform’ April 2012 contains proposals to ‘ensure the CAT plays a stronger role in facilitating ADR, in particular by ensuring ADR is the initial default option, by establishing pre-action protocol(s) and allowing formal settlement offers’.

The Commission’s White Paper does not mention arbitration, although the Commission has in the past endorsed commercial arbitration as a means of enforcing competition commitments, in particular in the merger control context.
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